TRACTORS (M) BHD.

v.

CHARLES AU YONG

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 156 OF 1971]
19 FEBRUARY 1982

BANKRUPTCY: *Act of bankruptcy - Judgment by default - Bankruptcy notice - Application to set aside - Counter claim - Whether could be set up in original claim - Section 3(1)(i) Bankruptcy Act 1967.*

The appellants filed a suit against the respondent claiming RM211,800 being the balance of the price of the goods (tractors) sold to them. The appellants obtained judgment by default as the respondent failed to serve defence. Subsequently the appellants served a bankruptcy notice on the respondent as he did not satisfy the default judgment. On application by the debtor respondent the learned Judge set aside the notice. The appellants appealed.

Held:
Appeal allowed. Learned Judge's order set aside and in its place an order that the notice of bankruptcy be restored is substituted. Debtor to pay cost.

[Appeal allowed.]

Case referred to:
Hunter v. Chief Constable of the West Midlands Police [1981] 3 WLR 906

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)

For the creditors & appellants - K.T. Ngiam
For the debtor - Jagjit Singh

JUDGMENT

Suffian LP:

This is an appeal from a decision of Harun Hashim J setting aside a bankruptcy notice served by the appellants on the respondent.

Two actions are involved between the same parties.

In the first action, Suit No. 1186 of 1975, the appellants (whom we shall refer to as the petitioning creditors or simply creditors) claimed against this debtor (whom we shall refer to as the judgment debtor or simply debtor) RM211,800, being the balance of the price of goods (tractors) sold and delivered by the judgment creditors to the debtor at the debtor's request. That suit was filed in Kuala Lumpur and served on the debtor's solicitors on 2 September 1979. On 8 September appearance was filed. By letter of 23 September (page 23 of the appeal record) the creditors gave notice that unless a defence was served on them within 48 hours they would enter judgment against the debtor. No defence was served. On 16 October the creditors obtained judgment by default.

Then on 17 December the debtor filed the second action, Civil Suit No. 192 of 1975, against the creditors - in the Malacca High Court. (This action has been part-heard and further hearing will be held this year).

The debtor did not satisfy the default-judgment in the first action. So on 1 April 1976, the creditors served on him Bankruptcy Notice No. 120 of 1976. This was however withdrawn on 29 November because of some defects. They then served a second bankruptcy notice (No. 108 of 1977) on the debtor or 24 February the following year, 1977.

As was earlier said, on application by the debtor the learned Judge set aside the notice, clearly on the ground that the debtor had satisfied him under s. 3(1) (i) of the Bankruptcy Act No. 55 of 1967 - clearly so from the notes of argument in the appeal record though we have not been supplied with the learned Judge's grounds. That section provides among other things that a bankruptcy notice may be set aside if the debtor satisfies the Court that he has a counterclaim which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not have set up in the action in which the judgment was obtained.

That section, be it noted, requires the debtor to satisfy the Court as to three things:

(a) that he had a counterclaim;

(b) the counter-claim equals or exceeds the sum ordered to be paid; and

(c) he could not have set up the counter-claim in the first action in Kuala Lumpur.

We regret that we are unable to agree with the learned Judge.

In our opinion, the essence of the claim of the debtor in the second action filed in Malacca does not amount to a counterclaim which he could not have set up in the Kuala Lumpur action in which the creditors obtained judgment within the meaning of s. 3 (1)(i) of the Act. On the contrary he could have set it up in the Kuala Lumpur action if his former solicitors had carried out his alleged instructions.

There has been a continuing business relation between the creditors and debtor relating to tractors of which the creditors were and are dealers, and Mr. Jagjit Singh for the debtor before us said that the tractor which was repossessed by the creditors on 1st October, 1975, was one of the tractors with which the two parties had business dealings, and in our opinion what was alleged by the debtor in the second action as the basis of his claim could have been the subject of a counter-claim in the first.

As we understand it, the first action in Kuala Lumpur and the second action in Malacca are connected, and the latter is the aftermath of the former and founded on the damage which the debtor claims he suffered as a result of the creditors resuming possession of the tractor. The matters raised in the statement of claim in the second action in Malacca would therefore appear to be nothing less than an attempt by the debtor to reopen the main suit in which the debtor filed no defence and made no counterclaim, and judgment-in-default was entered against him. The debtor's allegation against his former solicitors (that they neglected to file a defence and generally look after his interest) might give him a remedy against them, but does not affect his position *vis-a-vis* the judgment creditors.

The debtor made no attempt to apply to the Court to set aside the default-judgment, though he had plenty of time to do so. That judgment as earlier stated was obtained as long ago as on 16th October, 1975; the first bankruptcy notice was issued on 1st April, 1976, and after

its withdrawal the second bankruptcy notice was not served until 24th February, 1977. So there was plenty of time between the judgment and the first notice and also between the two notices in which the debtor could have applied to the Court the default-judgment in the first action to be set aside; and yet he did not do so.

In our judgment the Malacca action is tantamount to a collateral attack upon a final decision of a Court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in *Hunter v. Chief Constable of the West Midlands Police* [1981] 3 WLR 906 where a civil case was started obviously to try to overrule a decision of a criminal court. There Lord Diplock said at page 914:

> My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case.

He then cited with approval the following passages as expressing the principle to be followed by the Courts:

> ... the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court. (*per* AL Smith LJ i*n Stepbenson v. Garnett* [1898] 1. QB 677, 680-681).

> ... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again". (per Lord Halsbury LC in *Reichel v. Macgrath* [1889] 14 App. Cas. 665, 668).

In our judgment, this appeal must be allowed. Accordingly we set aside the learned Judge's order and in its place substitute an order that the notice of bankruptcy be restored.

The debtor to pay costs here and below, and the judgment creditors' deposit to be returned to them.

Also found at [1982] CLJ 152